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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1873

NEW YORK TIMES COMPANY, *et al.*, *Petitioners,*

—v.—

THE UNITED STATES OF AMERICA, *Respondent.*

THE UNITED STATES OF AMERICA, *Petitioner,*

—v.—

THE WASHINGTON POST, *et al.*, *Respondents.*

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

NORMAN DORSEN
New York University School of Law
Washington Square South
New York, New York 10012

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

BURT NEUBORNE
BRUCE J. ENNIS
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Attorneys for Amicus Curiae

OSMOND K. FRAENKEL
MARVIN M. KARPATKIN
JAMES HELLER
HOPE EASTMAN
Of Counsel

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Motion

The undersigned respectfully request leave to participate in the oral argument herein on the same terms as in the courts below. The parties have orally consented to the filing of this brief amicus curiae.

Interest of Amici Curiae

For fifty years the American Civil Liberties Union, and its New York State and Capital Area affiliates, have sought to preserve the freedoms established by the Bill of Rights. Amici have participated in thousands of cases involving the First Amendment to the Constitution. Amici believe that the instant case poses questions of critical importance to the continued existence of an informed citizenry and a free press.

Introduction

The suits filed by the United States to enjoin publication of the Vietnam Papers by The New York Times, The Washington Post, and other newspapers are unprecedented in American history. We have been able to discover no case, and counsel for the parties have referred to none, in which the federal government has asked the courts to censor the publication of a newspaper. The effort to do so in this case—so far successfully—is a singular departure from a common understanding which exists between the government and the people, now breached for the first time in two hundred years. The central ingredient of that understanding is that the people have the right to know what their government is doing, whatever the effect on the reputation of officials or administrations. So long as the information relates to the conduct of government—no matter how embarrassing, deceitful or dishonest that conduct may be—the people have a right to know about it, and the press has a duty to publish it. The government's only duty is to stand aside.

This understanding by the people of the United States has a direct historical relationship to the experience suf-

fered by the people of England in the process of securing freedom of the press, beginning particularly in the 16th Century when a decree of Star Chamber of June 23, 1585, imposed a system of licensing upon the press. The decree's preamble said:

> "Whereas sundry decrees and ordinances have upon grave advice and deliberation been heretofore made and practiced, for the repressing of such great enormities and abuses as of late (more than in times past) have been commonly used and practiced by divers contemptuous and disorderly persons, possessing the Art or Mystery of printing and selling of books: And yet notwithstanding, the said abuses and enormities are nothing abated; but (as is found by experience) do rather more and more encrease, by the willful and manifest breach and contempt of the said ordinances to the great displeasure and offence of the Queen's most Excellent Majesty . . ."

Now, our government, frightened by the "Art or Mystery of printing", once more asserts the right to lay hands upon the press and to prohibit the publication of information which, though perhaps embarrassing to the men who have occupied high office, is vitally important to the people of the United States and to the world at large.

There are two additional points of importance. First, The New York Times and The Washington Post are not the only defending parties in this case. The readers of these newspapers and the general public, though not named in the caption of the case, are as much parties in interest as the nominal defendants. Indeed, their interest is *superior* to that of the newspapers because the latter are merely instruments for informing the public of day to day events without which they would be unable intelligently

to fulfill their role as citizens interested in the welfare of the nation.

Second, the Court cannot overlook the subject matter of the documents which the government seeks to suppress. Those documents reveal how our country became involved in a war which is more controversial and divisive than any other governmental action of this century, and which cannot be matched by any event in American history with the exception of our Civil War. The country is torn over the Vietnam war. It has spawned violence, hatred and bitterness. It is on everyone's mind and everyone's lips. It has resulted in the deaths of tens upon tens of thousands of human beings—and its genesis, purposes, and effects are the subject of endless discussion.

Now, when it is learned that there are documents which might provide answers to some of those questions, which would allow the people to judge the men who generated the war, and which will give the people an opportunity to exercise their will in order to avert another such adventure—now the Government steps in to prevent the people from acquiring that information.

This Court must categorically reject the Government's assertion that revelation of the documents will endanger the national security. To accept that claim is to accept the *ipse dixit* that the affairs of government are or should be beyond the reach of ordinary citizens, and that officials are not accountable, here and now, for the actions they take in our name.

The only legitimate claim of national security that can be advanced in this case is one made on behalf of the citizens of the United States. The right of the people to know, and the right of the press to be free, are the real

interests of national security which are at stake in this case. The nation's security will be best insured by condemning the act of censorship here and by requiring that the First Amendment to the Constitution take precedence over all other claims.

In this vein, we observe that freedom of speech in this country has already suffered a severe setback in this case. With all allowance for the fact that the claim by the Government here was a novel one, the granting of a Temporary Restraining Order in the Southern District of New York, and the stays granted the Government to prevent publication there and in the District of Columbia and Massachusetts, have already resulted in censorship of material needed by the people and their legislative representatives to exercise their proper role in a democracy.

There should have been no stopping of the presses on the basis of the generalized allegations made by the Government in this litigation. Before a restraining order is granted which would prevent publication for even an hour the Government should be required to make *particularized* allegations of the relevant kind of harm to the national interest* that would ensue from publication and, in addition, make out a prima facie case to a District Judge *on the spot* that publication would in fact cause such harm. The Government has met neither of these requirements, and the course of litigation has shown that they could not have. It is therefore all the more unfortunate that the press and the people have endured two weeks of censorship of the important material involved in the Vietnam Papers.

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* The specific criteria which we think should govern are set out and discussed in Section I of this brief.

I.

The well established First Amendment prohibition against prior restraints upon the dissemination of information relevant to questions of public or general interest precludes the issuance of an injunction against the publication of the historical accounts involved in this litigation.

A. The Importance of the Ban on Prior Restraints

The constitutional prohibition on the imposition of prior restraints upon the dissemination of information of "general or public interest" is among the most important protections provided by the First Amendment. Designed as a procedural safeguard to insure that all information relevant to the exercise of an informed political judgment gains access to the market place of ideas, the ban on prior restraints stands as the mainstay of our commitment to free trade in ideas.[1]

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[1] The ban on prior restraints emerged historically from the bitter struggles over the English licensing laws. In 1537, fearful of Puritan agitation, the Star Chamber of Henry VIII promulgated comprehensive regulations licensing the printing of books. Tanner, *Tudor Constitutional Documents 1485-1603*, 279-84 (1903). In 1637, the Star Chamber directive was dramatically expanded and became the model for the act of the Restoration Parliament for the licensing of books, 14 Car. II, c. 33. After years of libertarian agitation (see, Milton, *An Appeal for Unlicensed Printing* (1644), the licensing acts were permitted to lapse in 1694. Although the press continued to chafe under the restraints of the law of seditious libel, the lapse of the licensing act and the adoption of the First Amendment signified the end of prior restraints on information of general and public interest. In fact, even under the highly repressive Sedition Act from 1798-1801, no attempt to secure injunctive relief against the Republican press was made because of the general understanding that the First Amendment absolutely forbade the imposition of a prior restraint against newspapers.

For more than sixty years this Court has re-affirmed the ban on Government pre-censorship of information "of general or public interest."[2] Mr. Justice Holmes, writing for this Court in *Patterson* v. *Colorado*, 205 U.S. 456 (1907) recognized that:

> "the main purpose of such constitutional provisions [the First Amendment] is 'to prevent all such previous restraints upon publications as had been practiced by other governments . . . " 205 U.S. at 462.

In *Near* v. *Minnesota*, 283 U.S. 697 (1931), Chief Justice Hughes, in a landmark decision, ruled that an injunction against the publication of a newspaper constituted an unlawful prior restraint. In the forty years since *Near* v. *Minnesota*, this Court has time and time again reiterated that prior restraints are anathema to the proper functioning of a democratic society. *E.g.*, *Grosjean* v. *American Press Company*, 297 U.S. 233 (1936); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Niemotko* v. *Maryland*, 340 U.S. 368 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958).[3]

The abhorrence of prior restraints rests upon the understanding that a fundamental prerequisite of a functioning

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[2] The phrase, information "of public or general interest" was originally coined by Warren and Brandeis in their classic article, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890). This Court adopted the phrase to describe the scope of constitutional protection from State libel laws. *E.g.*, *Rosenbloom* v. *Metromedia, Inc.*, —— U.S. ——, 39 U.S.L.W. 4694 (June 7, 1971).

[3] This Court's continuing concern with the danger of vague and overbroad statutes in the First Amendment area reflects a recognition that such statutes are the functional equivalent of licensing systems. *E.g.*, *Coates* v. *City of Cincinnati*, —— U.S. ——, 39 U.S.L.W. 4630 (June 1, 1971).

political democracy is an informed citizenry. In the words of Judge Cooley, the prohibition on prior restraints is designed to disable the State from preventing:

> "Such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley, *Constitutional Limitations*, 886 (8th ed.). See also Chaffee, *Free Speech in the United States*, 10, 221 (5th Printing 1954).

Functionally, the prohibition upon governmental precensorship of information of "general or public interest" is designed to preserve two complementary constitutional rights—the right of the people to be informed and the right (and obligation) of the press to inform them. This Court has forged a proud constitutional heritage in protecting those rights.

In a series of opinions this Court ruled that citizens in a democracy possess an inalienable right to receive precisely the type of political information which the Executive now seeks to enjoin.[4] *E.g.*, *Martin* v. *Struthers*, 319 U.S. 141, 143 (1943); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *Stanley* v. *Georgia*, 394 U.S. 557 (1969).[5]

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[4] James Madison described the right to know as follows:

"Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both" (1822). (Quoted in *The Complete Madison* (1953), p. 337.)

[5] See also, *United States* v. *Dellapia*, 433 F.2d 1252, 1258 n. 25 (2nd Cir. 1970); *Caldwell* v. *United States*, 434 F.2d 1081, 1089 (9th Cir. 1970); *Hiett* v. *United States*, 415 F.2d 664, 671 (5th Cir. 1968); *Brooks* v. *Auburn University*, 412 F.2d 1171, 1172

Similarly, this Court has rendered a virtually unbroken line of decisions upholding the right of a free press to disseminate information on public issues free from governmental restraint, even when such dissemination was alleged to have impinged upon competing social interests.[6] *E.g.*, *Near* v. *Minnesota, supra; Grosjean* v. *American Press Company, supra; Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Rosenbloom* v. *Metromedia, Inc.*, —— U.S. ——, 39 USLW 4694 (June 7, 1971); *Ocala Star-Banner Company* v. *Damron*, 91 S. Ct. 628 (1971); *Monitor Patriot Company* v. *Roy*, 31 S. Ct. 621 (1970); *Time, Inc.* v. *Pape*, 91 S. Ct. 633 (1971); *Greenbelt Coop. Publ. Assn.* v. *Bresler*, 398 U.S. 6 (1970); *Beckley Newspaper Corp.* v. *Hanks*, 389 U.S. 81 (1967); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967); *Associated Press* v. *Walker*, 388 U.S. 130 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

(5th Cir. 1969); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970); *Mandell* v. *Mitchell*, —— F. Supp. ——, 39 L.W. 2531 (E.D.N.Y. 1971); *United States* v. *B & H Dist. Corp.*, 319 F. Supp. 1231 (W.D. Wisc. 1970); *ACLU* v. *Radford College*, 315 F. Supp. 893 (W.D. Va. 1970); *Williams* v. *Blount*, 314 F. Supp. 1356 (D.D.C. 1970); *Smith* v. *University of Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969).

[6] Thomas Jefferson described the significance of a free press to a functioning democracy as follows:

> "The way to prevent these irregular interpositions of the people is to give them full information of their affairs through the channels of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. *The Papers of Thomas Jefferson* (1955) Vol. XI, p. 49.

Thus, the prohibition on prior restraints is an integral bulwark of our nation's basic commitment to "open and robust debate" with respect to public affairs. *New York Times* v. *Sullivan*, 376 U.S. 254, 269-270 (1964), recently reaffirmed in *Rosenbloom* v. *Metromedia, Inc.*, —— U.S. ——, 39 U.S.L.W. 4694 (June 7, 1971). As this Court stated in *Thornhill* v. *Alabama*, 310 U.S. 88 (1940):

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of our society to cope with the exigencies of their period." 310 U.S. at 102.

The constitutional prohibition on prior restraints is of critical importance because a prior restraint, as opposed to a system of subsequent criminal sanctions, endangers the ability of citizens to secure access to the "information needed or appropriate to cope with the exigencies of [his] period." As Professor Thomas Emerson, the nation's foremost First Amendment scholar, has noted:

> "[A system of prior restraint] is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows." T. Emerson, *The System of Freedom of Expression*, 506 (1970).

The core constitutional values of an informed citizenry and a free press are specifically and egregiously threatened

by the injunction sought in this case, as the events of the past two weeks graphically illustrate. Information critical to the exercise of informed political judgment has already been withheld from the public and their representatives in Congress during the pendency of several critical votes involving the war in Vietnam. Thus, during a two week Congressional debate on the war in Vietnam, our democracy has been forced to function, in part, in the dark.

Even more destructive to First Amendment values than the simple unavailability of a particular document, or set of documents, is the system of prior restraints which we have endured for the past two weeks. We have witnessed, for the first time in our nation's history, governmental pre-censorship of a newspaper's publication of material of general and public interest through a network of restraining orders, stays and appeals—in short we have been subjected to precisely the licensing apparatus it was the purpose of the First Amendment to dismantle forever. See Note 1 *supra*. Whatever the final outcome of this case, a dangerous precedent has been established which strikes at the very core of the First Amendment.

B. Any Acceptable Constitutional Test Precludes an Injunction Here

On at least two occasions the Supreme Court has indicated that there may be *no* previous restraint of publication under the First Amendment. Justice Holmes, for the Court in *Patterson* v. *Colorado*, *supra*, stated it to be "the main purpose" of the First Amendment to prevent *all* such restraints (205 U.S. at 462), and in *Grosjean* v. *American Press Co.*, *supra*, a unanimous Court stated that "by the First Amendment it was meant to preclude the states, from adopting *any form* of previous restraint upon

printed publications . . . ." (297 U.S. at 249) (emphasis added in both cases).

It is true of course that in the *Near* case—decided, it should be noted, prior to *Grosjean*—the Court in dicta narrowly qualified the absolute prohibition on prior restraints by stating that "a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." 283 U.S. at 715.[1]

Even if it is to be accepted that the unqualified language of the *Patterson* and *Grosjean* cases has been qualified by the dictum in *Near*, the history of the First Amendment compels two important conclusions:

1. The *Near* "exception" must be construed as narrowly and specifically as possible; and

2. The Government must carry the highest possible burden of persuasion to establish that a given situation is in fact such an "exception."

1. *The Standard.* At the very minimum, in order to pass constitutional muster, a standard for prior restraint must satisfy two criteria, both of which the Government must

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[1] The founders clearly recognized that information concerning military matters was not an exception to the First Amendment. Thomas Jefferson stated: "The first misfortune of the Revolutionary War induced a motion to suppress or garble the account of it. It was rejected with indignation." *The Writings of Thomas Jefferson* (1904), Vol. XIII, p. 264.

"Your fellow citizens think they have a right to full information in a case of such great concernment to them. It is their sweat which is to earn the expenses of the war, and their blood which is to flow in expiation of the causes of it." Letter from Thomas Jefferson to Eldridge Gerry, Jan. 26, 1799. *The Writings of Thomas Jefferson* (1904), Vol. X, p. 83.

meet before achieving its goal of censorship. The first criterion defines the type of information that could conceivably be suppressed; the second criterion is whether the information is of value in permitting citizens to render an informed judgment on public issues. Even if the information satisfies the first criterion it may not be censored if it falls within the second category. In other words, the information must be shown to be within the first criterion *and* outside the second criterion.

As we maintain below, the information involved in this case is so far from that which could be properly suppressed that there is, strictly speaking, no reason for the Court to elaborate the governing standards in detail. Nevertheless, we propose minimal standards because of the importance of clarifying this issue for the future.

The only information that could conceivably be suppressed under the first criterion is limited to the following:

a. Present or future tactical military operations;

b. Blueprints or designs of advanced military equipment; and

c. Secret codes.

The common denominator of the above classes is that an informed citizen need not have access to such information to perform his role properly. In contrast, if the Government's vague and broad test "information detrimental to the national security" is accepted, there would be virtually no limit to the Government's ability to seek injunctions in District Courts. Indeed, the concept of "national security" is a political concept, which involves

in its application a matter of discretion that could be employed to stifle First Amendment rights.

So much for the first part of the standard—which limits the Government to seeking injunctions against publication of particularized categories of information.

Furthermore, even if the Government could prove particularized categories of information—for example, future plans for the landing at the Bay of Pigs or the invasion of Laos or Cambodia—that information would nevertheless be within the second category and therefore absolutely protected against prior restraint. Such information involves questions of public policy—whether to enter a new war or a wider war—that must be subject to the debate and will of the people. In such cases, there could be no injunction because the key premise of the First Amendment is that on public questions there should be "open and robust debate," *New York Times, Inc.* v. *Sullivan, supra,* 374 U.S. at 269-70.

The value of the suggested distinction is illustrated by the Bay of Pigs situation. Subsequent to the events, President Kennedy was reliably reported as having stated to the Managing Editor of the New York Times, "If you had printed more about the operation, you would have saved us from a colossal mistake." See Bernstein and Gordon, *The Press and the Bay of Pigs,* The Columbia University Forum, Fall 1967.

2. *The Application of the Standard to This Case.* If the criteria suggested above are applied to the material which the New York Times seeks to publish no prior restraint may be condoned.

First, there is significant doubt whether any of the documents involved contain information creating any danger whatever to our "national security", much less the more specific criteria we recommend as the proper standard. Although as amicus curiae the ACLU was not given access to the *in camera* hearings, the opinions of the two District Judges who have ruled on the issue, after conducting hearings at which the Government was given a chance to prove its case, are persuasive evidence that the documents here cannot be suppressed consistently with the First Amendment.

It should be borne in mind that of the 19 federal judges who have reviewed the materials a total of 12 have flatly rejected the Government's position on the "prejudicial" effect of the documents. The others believe that further *in camera* hearings are desirable. *Not a single federal judge* has so far stated his agreement with the Government's claim. Surely, this is weighty evidence as to the "sensitivity" of the documents. The point is all the more telling when it is considered that the Government initially claimed in its complaints that the materials *already* made public were sufficiently prejudicial to the national interest to have been suppressed. We still await proof of this assertion.

Second, even if several of the documents in question would, for the sake of argument, fall within the first criterion, their central importance to the proper functioning of a political democracy is plain. Accordingly, following the basic purposes of the First Amendment, the Court should not tolerate censorship of information that would be valuable to an informed citizenry on public questions. Simply put, if information is of "general or public interest", no

prior restraints on its dissemination are permissible. Cf. *Rosenbloom* v. *Metromedia, Inc., supra.* Only that narrow species of data which is not of value to the exercise of an informed political judgment by the electorate may even arguably be the subject of an injunction. Secrecy does not mean safety, as so many of the Congressmen and other public figures who have already welcomed the disclosures have reminded us.[8]

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[8] In this connection, it must be made clear that the ministerial act of government officials in labeling certain information as "Secret" or "Top Secret" can never be a substitute for judicial review under whatever First Amendment criteria are ultimately adopted. House Report No. 1895, 81st Cong., 2d Sess., reprinted in 2 U.S. Code Cong. Serv. (1950) 2297-2300, in describing §798, expressly recognized that "the classification must be *in fact* in the interests of national security" before criminal conviction will be authorized. A contrary ruling would in effect turn over the constitutional decision to administrative officials and thereby enshrine exactly the kind of licensing procedure that it was the explicit purpose of the First Amendment to eliminate. See *Near* v. *Minnesota, supra,* 283 U.S. at 713. As the Court said in *United States* v. *Reynolds,* 345 U.S. 1, 8 (1953), "a complete abandonment of judicial control would lead to intolerable abuses" and "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 8, 9-10.

In addition, the Court should not accept a claim by the Government that information must be suppressed without insisting that that claim be "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States* v. *Reynolds, supra,* 345 U.S. at 7-8. It is not clear in the present case whether the claim should be lodged by the Secretary of Defense or by the Secretary of State, or both, but it is clear that *neither* has done so. Instead, the claim has been lodged only by the General Counsel of the Department of Defense and, inferentially, by an Assistant Attorney General. The "head of the department" rule announced in the *Reynolds* case arose in the context of a tort action, not involving on the non-government side, any constitutionally protected interest, and certainly not an interest as important as freedom of the press or the public's right to know.

C. The Dissemination of the Historical Material at Issue in This Case Is Absolutely Protected Against Governmental Sanction

The constitutional principles underlying the prior restraint doctrine are rendered even more compelling in this case because dissemination of the material which the Executive seeks to suppress is absolutely protected, even from subsequent punishment, by the First Amendment.

Despite the fact that the historical and political documents at issue are central to the proper functioning of a representative democracy and are, therefore, entitled to the highest quantum of constitutional protection, the Executive argues that their publication violates Title 18 USC §793 (the Espionage Act).

Although the Executive has couched its Espionage Act argument in terms of national defense, it has been unable to convince any judge that the nation's military or security posture would be compromised by the publication of the remainder of the Vietnam Study. As Judge Gurfein noted after extensive *in camera* hearings, the "irreparable injury" which the Executive claims would flow from the Study's publication is merely acute embarrassment on the part of high government officials involved in decisions leading to the escalation of the war in Vietnam.

Thus, although the Government's contentions are phrased in the parlance of the 20th century, they carry ominous echoes of an earlier era when the United States asserted the power to punish as "seditious" the dissemination of ideas which it believed would be detrimental to the national interest by tending to bring the Government "into contempt or disrepute." (1 Stat. 596, July 14, 1798) (The Sedition Act). Stripped to its essentials, the Government's case

is little more than an exhumation of the unlamented Sedition Act, condemned by the Supreme Court—and by history—as contrary to the basic tenets of a free society. See *New York Times* v. *Sullivan*, 376 U.S. 254, 273-276 (1964).

The First Amendment itself was adopted against the background of widespread use of the common law of seditious libel to punish the dissemination of material embarrassing to the Government. From the trial of John Peter Zenger, 17 How. St. Tr. 675 (1735), to the adoption of the First Amendment, the founders had wrestled with the intolerable burdens which seditious libel imposed upon a free press.[9] See, generally, Levy, *Freedom of the Press From Zenger to Jefferson* (1966); Chafee, *Free Speech in the United States*, ch. XIII (1941); Emerson, *The System of Free Expression*, ch. V (1970). The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.

Indeed, if the Government can suppress information critical to the informed exercise of political judgment merely

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[9] The first prosecution for seditious libel after the adoption of the First Amendment was directed against Benjamin Franklin Bache, a grandson of Benjamin Franklin, whose newspaper, the Philadelphia Aurora, published the text of the Jay Treaty in 1795 while the Senate was considering it in secret. Bache died before he could be brought to trial. Prior to the instant case, the most recent attempt to invoke the laws of seditious libel against a newspaper involved Theodore Roosevelt's attempt to prosecute The New York World and the Indianapolis News in 1908 in connection with Joseph Pulitzer's scathing accusations of corruption surrounding the acquisition of the Panama Canal Zone. Nelson, *Freedom of the Press from Hamilton to the Warren Court* (1967). Before this case, it was widely believed that this Court's opinion in *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) had applied the *coup de grâce* to seditious libel in the United States.

by invoking the shibboleth of national security, the basic commitment of this nation to free trade in ideas will be severely weakened. The assertion by the Executive that it may restrain the publication of the documents at issue here, combines the worst elements of the British licensing acts and the law of seditious libel. That such an assertion could have already succeeded in imposing a prior restraint of two weeks' duration is disquieting—but were it to prevail on the merits, it would be nothing short of a disaster.

II.

The District Courts were without jurisdiction to entertain the Government's application for injunctive relief to restrain First Amendment activities.

Throughout these various proceedings, the primary focus has been upon the clash between the First Amendment interests of the newspapers and the American public, and the Government's asserted claims of the national security. From the very outset, however, the defendants and the *amici* have urged a narrower, alternative basis for disposition of these cases, namely, that the District Courts lacked subject matter jurisdiction to entertain the Government's request for injunctive relief.

From the very first the Government has cast about for a jurisdictional theory of its case. Initial reliance on 28 U.S.C. §1345 was subsequently abandoned, the Government probably realizing that this section merely gives the United States authority to sue, but does not confer subject-matter jurisdiction in the particular case. Instead, the Government offered two additional, nonstatutory bases of juris-

diction: (1) the Government's inherent power to utilize the courts to "protect its interests," and (2) the ancillary theory of the court's authority to fashion implied, civil remedies from the criminal prohibitions contained in the Espionage Act, 18 U.S.C. §793(e).[10]

We submit that the judicially-created doctrine of inherent powers has not and cannot be invoked as a source of jurisdiction to seek to restrain the exercise of First Amendment rights. We further submit that the criminal statute invoked here does not represent the kind of comprehensive regulatory arrangement which has occasionally motivated this Court to imply a civil remedy which the Government could pursue.[11]

It is axiomatic that United States District Courts are courts of limited jurisdiction, dependent upon the Congress for affirmative and specific grants of power. See *Lockerty* v. *Phillips*, 319 U.S. 182 (1944); *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir.), *cert. denied*, 39 Law Week 3258 (1970); see generally, H. Hart and H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 312-340 (1953). Any claim that the federal courts have inherent jurisdiction sim-

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[10] In the *Washington Post* case, the Government additionally relied upon 11 D.C. Code §521 which provided general jurisdiction for the United States District Court for the District of Columbia. But it is doubtful that this statute was intended to allow a suit by the United States, and it is questionable whether such general jurisdiction is still retained by the District Court in light of the recent creation of the Superior Court of the District of Columbia. See, *Tatum* v. *Laird*, —— F.2d —— (D.C. Cir., 4/27/71), slip. op. at pp. 5-6, n. 5.

[11] Executive Order No. 10501 cannot provide a basis for jurisdiction. *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

ilar to that possessed by common law courts must be scrutinized against this constitutional premise.

The primary source of the "inherent power" theory of jurisdiction is the Court's decision in *In Re Debs*, 158 U.S. 564 (1895), which stemmed from the massive Pullman Strike of 1894. The government had obtained an injunction against the strike in order to prevent the continued forcible obstruction of the "carriage of the mails". *Id.* at 577. The Court emphasized that the Constitution expressly granted Congress powers over interstate commerce and the maintenance of a postal system, and that Congress had extensively legislated to implement those responsibilities. Relying on two earlier decisions which had allowed the United States to sue to set aside fraudulently obtained patents, the Court found that the federal government had a sufficient proprietary interest in the mails to justify its application for injunctive relief (158 U.S. at 582-83).

But the Court articulated a broader rationale for its decision. It reasoned that the national government could use force to deal with the emergency: "The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails" (*id.* at 582). *A fortiori*, it could resort to its courts to accomplish the same objectives:

> Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The

> obligations which it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court (158 U.S. at 584).

A principle of this nature is potentially limitless. But fortunately it has been restricted in its application by subsequent decisions.

First, almost every one of the relatively few cases in which the Court has relied on the *Debs* principle, thus allowing the United States to seek injunctive relief despite the absence of a specific jurisdictional statute, has involved specific and limited obstructions to the modes of interstate commerce such as navigable rivers. See, *e.g., Wyandotte Transportation Co.* v. *United States,* 389 U.S. 191 (1967); *United States* v. *Republic Steel,* 362 U.S. 482 (1960); *Sanitary District of Chicago* v. *United States,* 266 U.S. 405 (1925) (all involving navigable waterways). More recently, lower courts have held this principle to encompass those burdens on interstate commerce imposed by racial discrimination in transportation facilities. See, *e.g., United States* v. *City of Jackson,* 318 F.2d 1 (5th Cir. 1963); *United States* v. *City of Shreveport,* 210 F. Supp. 36 (W.D. La. 1962).

Secondly, the *Debs* principle has been limited to areas where there were comprehensive and remedial federal statutory arrangments, and where a clear legislative purpose would be served by allowing the United States to seek civil relief of a specific kind. See, *e.g., Sullivan* v. *United States,* 395 U.S. 169 (1969); *Wyandotte Transportation Co.* v. *United States, supra; United States* v. *Arlington County,* 326 F.2d 929 (4th Cir. 1964) (both involving the Soldiers' and Sailors' Civil Relief Act). Such cases have often in-

volved the proper adjustment of federal-state relationships with regard to federal personnel or programs. See, *e.g.*, *Paul* v. *United States*, 371 U.S. 245 (1962); *Sullivan* v. *United States*, *supra*; *cf. United States* v. *Brittain*, 319 F. Supp. 1058 (N.D. Ala. 1970).[12] In sum, *Debs'* progeny has been limited primarily to suits seeking vindication of the pervasive national power under the Commerce Clause, effectuation of the purposes embodied in systematic statutory arrangements, or frequently both. Thus, it is one thing for the Court to accept the Government's claim of inherent power when that claim is invoked to enforce a specific constitutional provision (the Commerce Clause). It is quite another thing, when the claim of inherent power is invoked to defeat or abridge a specific constitutional provision (the First Amendment).

Research has disclosed no case where inherent or nonstatutory jurisdiction was claimed by the Government as a basis for injunctive relief where First Amendment rights were interposed by the defendant. The absence of such cases is readily understandable. First, of course, any such attempt to enjoin arguably protected First Amendment activity runs immediately afoul of the clear prohibition on prior restraints. See Point I, *supra*. Moreover, the values embodied in the First Amendment are themselves affected with an overriding public interest as compelling as the Government's claim of national security. For, unlike most

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[12] *Brittain* also reflects the use of the concept of nonstatutory jurisdiction to allow the United States to take action against states or their surrogates on behalf of individuals who have clearly been denied constitutionally protected rights. See, *e.g.*, *United States* v. *Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970) (also involving protection of interstate commerce); *United States by Katzenbach* v. *Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965) (three-judge court).

other constitutional protections, the safeguards of the First Amendment, particularly the guarantee of a free press, were designed to insure the proper functioning of our political democracy. As the Sixth Circuit said, in rejecting a similar claim of "inherent powers", "[b]eyond doubt the First Amendment is the cornerstone of American freedom". *United States* v. *United States District Court*, —— F.2d ——, 39 Law Week 2574, 2575 (1971). The granting of inherent, nonstatutory power may be acceptable to support an injunction against depositing wastes in a navigable stream. But where the First Amendment and the fundamental societal policies it embodies are interposed, they constitute a limiting principle on the application of such an elusive and open-ended jurisdictional concept.

In addition, our suggestion that this is a singularly inappropriate occasion to allow injunctive jurisdiction where none has been conferred by the Congress is bolstered by the settled principle that equity will not enjoin criminal conduct. See *United States* v. *Jalas*, 409 F.2d 358 (7th Cir. 1969); see generally, *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 996, 1013-1018 (1965). None of the three exceptions to this general principle is applicable here. The first encompasses situations of widespread national emergency of the kind involved in *In Re. Debs.* There has been no contention by the Government that this exception is applicable. The second exception deals with actions seeking to abate a public nuisance. *In Re Debs* and *United States* v. *Republic Steel Corp., supra,* cases involving inhibitions on interstate commerce, can be assimilated to this principle. It too is not relevant here.[13]

[13] As Justice Harlan has noted, *Debs* "stands simply for the proposition that the Commerce Clause gives the Federal Government standing to sue on a basis similar to that of private individuals

The third exception comes into play when a statutory arrangement specifically or impliedly authorizes such civil relief. This Court has occasionally implied a civil remedy out of a comprehensive statutory scheme in order to effectuate the remedial purposes of that legislation. See, *e.g.*, *Wyandotte Transportation Co.* v. *United States*, *supra*. Moreover, since the criminal penalties imposed by such legislation were usually "meagre", the normal equity rule gave way in favor of granting the kind of essentially civil remedy contemplated by the statute. See, *e.g.*, *United States* v. *Republic Steel Corp.*, *supra*. Here, however, Congress expressly refused to afford civil remedies when it passed the Espionage Act. *Cf. United States* v. *Jalas*, *supra*. See Point III, *infra*. And the criminal penalties rather than being meagre are severe. Finally, the very vagueness of the criminal statute from which the Court is urged to imply an injunctive remedy reflects the wisdom of equity's traditional reluctance.

In sum, the inherent powers jurisdiction rule of *Debs* has not had an expansive history and has never been applied when First Amendment rights are involved. Moreover, the Espionage Act is not the kind of statute from which civil remedies should be implied. The only proper avenue of redress for the Government is to prosecute criminally those who it believes have violated its laws.

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under nuisance law". *United States* v. *Guest*, 383 U.S. 745, 769 (1966). Indeed, even in *Wyandotte*, this Court left open the question of whether the United States still has a nonstatutory inherent right to bring such an injunctive suit (389 U.S. at 196, n. 5, 201).

III.

The only statute relied upon by plaintiff, 18 U.S.C.A., Section 793, provides no authority for relief in this case.

A. The Act Does Not Authorize Prior Restraint of the Press

The only statutory authority cited by plaintiff for the extraordinary relief sought herein is 18 U.S.C.A. §793. That statute, in its present form and wording, was enacted on September 23, 1950 by section 18 of Chapter 1024 of the acts of the 81st Congress, 2nd Session, reported at 64 Stat. 987, 1003-1005.[14] Section 1(b), of the act, reported at 64 Stat. 987, provides:

> "Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." [15]

Congress, sensitive to the importance of a free press[16] carefully prefaced the act with an express disavowal of

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[14] Chapter 1024 was known as the "Internal Security Act of 1950," and was divided into two Titles. Title I, of which section 18, now section 793 of the Code, was a part, was known as the "Subversive Activities Control Act of 1950".

[15] Section 1(b) is printed also in 1950 *U.S. Code & Cong. Serv.* 984.

[16] Indeed, the express purpose of the act was to protect this country from "totalitarian" forms of government which would deny those "fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press . . ." Chapter 1024, section 2(2), 64 Stat. 987.

any intent to authorize a prior restraint, or in any way to limit freedom of the press. The Government may, if it chooses, attempt to prosecute defendants under section 793, but it may not invoke section 793 as authority for an entirely different type of remedy, a remedy which Congress expressly proscribed.

The legislative history, reported in 1950 *U.S. Code & Congressional Service,* 81st Cong., 2nd Sess. at pp. 3886-3922 (cited hereafter as "Code Service"), reveals that the act's prohibition of prior restraint was a carefully considered legislative response to problems which Congress realized were of constitutional dimension, as we have demonstrated above. House Report No. 2980 phrased the problem as follows (Code Service, p. 3888):

> "The [House] committee approached the problem with care and restraint because it is believed essential that any legislation recommended be strictly in accordance with our constitutional traditions. How to protect freedom from those who would destroy it, without infringing upon the freedom of all our people, presents a question fraught with constitutional and practical difficulties. We must not mortally wound our democratic framework in attempting to protect it from those who threaten to destroy it."

But the House bill, though it was careful not to *authorize* prior restraint, did not expressly prohibit it, an omission the Senate considered objectionable. The Senate therefore passed a bill containing the "additional language" now found in section 1(b) of the Act.[17] The "managers on the

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[17] Senate Report No. 2369, to accompany S. 4037, 81st Cong., 2d Sess., at p. 3.

part of the House" (Code Service, p. 3899), one of whom was the Hon., now President, Richard Nixon (Code Service, p. 3922), agreed to the Senate's language, and the Conference Report recommended the enactment of the Senate language (Code Service, p. 3900).[18]

In *United States of America* v. *The Washington Post Company, et al.*, —— F. Supp. ——, (D.D.C., Civil Action No. 1235-71, June 18, 1971), Judge Gerhard Gesell, in denying the government's request for a temporary restraining order, relied upon section 1(b): "18 U.S.C. §793 provides for possible criminal sanctions in these circumstances but Congress in that state did not authorize any injunctive action. Indeed, Congress appears to have condemned any pre-existing restraint or censorship of the press by the language of the Internal Security Act of 1950 (Sec. 1(b), of which this statute is a part . . . ."

B. Section 793 Does Not Authorize Relief.

Even if the Internal Security Act, of which section 793 in its present form is a part, could be construed not to prohibit prior restraint of the press, section 793 would still not authorize relief.

1. ***Subdivision (d) of section 793 is, by its terms, inapplicable.***

The Government's own papers demonstrate conclusively that subdivision (d) is inapplicable. Subdivision (d) applies only to persons "lawfully having possession of", or lawfully intrusted with documents "relating to the national

[18] The Conference Report and the report of the House Managers were eventually read on the floor of the House. *Congressional Record—House*, Vol. 96, Part II (September 20, 1950), pp. 15265, 15279-15280.

defense." The complaint, paragraphs "4" and "5", alleges that defendants "without lawful authority obtained" the documents at issue herein. And paragraph "4" of the Buzhardt affidavit alleges that the *Times* "was not authorized . . . to have possession" of said documents. Accordingly, the Government cannot even claim, much less prove, that defendants' possession was "lawful", the prerequisite to relief under subdivision (d).

2. *Subdivision (e) of section 793 is, by its terms, inapplicable.*

a. Subdivision (e) does not purport to cover classified documents or information.

An entirely different section of the Act—§798—deals expressly and exclusively with dissemination of "classified" material. Subdivision (e) of §793, which carefully specifies the types of subject matter proscribed, does not use the word "classified." Clearly that subdivision is inapplicable when the very essence of plaintiff's case is that the Vietnam Study is a classified document.[19]

b. Subdivision (e) does not purport to cover publications.

Both subdivision (e) and §798 proscribe any attempt to "communicate" or "transmit" certain types of information, but subdivision (e), unlike §798, does not expressly proscribe "publication." Congress clearly viewed "communicate," "transmit" and "publish" as dis-

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[19] "Where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis", and no other. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 662 (1952) (Clark, J., concurring).

tinct acts, and whatever Congress intended to proscribe by the word "publish", a question difficult enough in itself, it did *not* intend to proscribe under subdivision (e). If the acts which the Government seeks to enjoin would constitute "publication", then its reliance upon §793 (e) is misplaced. Although §798, which speaks of the "publication" of "classified information" would seem, at first blush, to be the more applicable of the two sections, the Government no doubt decided not to rely upon §798 because the materials at issue here do not even arguably fall within one or more of the four types of classified information whose publication is proscribed by §798.

C. If Section 793 (e) Is Applicable, It Is Unconstitutional.

Section 793 (e) is, for a criminal statute, remarkably vague. The first part of the statute is predicated upon unauthorized possession of various "documents" and other tangible items. The second part speaks of unauthorized possession of "information". The "information" clause expressly requires that the possessor of the information have "reason to believe" that the information he possesses "could be used to the injury of the United States or to the advantage of any "foreign nation", but the "document" clause does not expressly require "reason to believe" that the documents "could be used to the injury of the United States", etc. If the "reason to believe" requirement does *not* modify the "document" clause, then the "document" clause either establishes a criminal presumption that the possessor intends injury—a presumption which would clearly be unconstitutional under the test for criminal presumptions announced in *Leary* v. *United States,* 395 U.S. 6, 33 (1969)—or the "document" clause proscribes

the possession and communication of documents whose publication the possessor need not even suspect could, or would, be injurious to the United States.

The latter interpretation would render the statute void. *Gorin* v. *United States*, 312 U.S. 19, 27-28 (1941). And it is the latter interpretation which finds support in the legislative history. *E.g.*, Senate Report No. 2369, to accompany S. 4037, 81st Cong., 2d Sess., at pp. 8-9, amending §793(d).

On the other hand, if the "reason to believe" requirement *does* modify the document clause, a questionable construction, then the Government must come forward with *evidence*, not mere assertions, sufficient to prove that the defendants (that is, in effect, The New York Times and the Washington Post) acted in "bad faith," having reason to believe that the documents (or information) could be used to the injury of the United States. The possibility of such proof is obviated by the Government's concession during oral arguments that the defendants "acted in good faith."

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and the case remanded to that court with instructions to enter a judgment affirming the judgment of the District Court.

The judgment of the United States Court of Appeals for the District of Columbia should beaffirmed.

Respeetfully submitted,

NORMAN DORSEN
New York University School of Law
Washington Square South
New York, New York 10012

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

BURT NEUBORNE
BRUCE J. ENNIS
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

Attorneys for Amicus Curiae

OSMOND K. FRAENKEL
MARVIN M. KARPATKIN
JAMES HELLER
HOPE EASTMAN
Of Counsel